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IN THE
Supreme Court of the United States

No. 51

OCTOBER TERM, 1943

LONNIE E. SMITH,
Petitioner,

VS.

S. E. ALLWRIGHT, ELECTION JUDGE, AND
JAMES E. LIUZZA, ASSOCIATE ELECTION
JUDGE, FORTY-EIGHTH PRECINCT,
HARRIS COUNTY, TEXAS,
Respondents.

AMICI CURIAE ARGUMENT IN SUPPORT OF
RESPONDENTS' MOTION FOR REHEARING

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TO THE SUPREME COURT OF THE UNITED STATES:

George A. Butler, as Chairman of the State Democratic Executive Committee, and the State Democratic Executive Committee, as *amici curiae*, present the following argument in support of the motion for rehearing filed in the above cause by Respondents.

Regardless of whether or not the Court, on motion for rehearing reaches a different conclusion from that expressed in the majority opinion, surely the Court will not leave standing in that opinion the following sentence:

"Under our Constitution, the great privilege of choosing his rulers may not be denied a man by the State because of his color."

The author of the opinion and the seven Justices that concurred do not look upon public officers as "rulers"; and certainly they will not write into the reports of the Supreme Court of the United States a sentence which to future generations may carry the implication that the Supreme Court of the United States regarded public officers as "rulers" over the people, instead of servants of the people.

II.

The right to organize and maintain a political party is secured by the Bill of Rights of the Constitution of the United States and by the Bill of Rights of the Constitution of Texas. Implied in this right is the further right of determining the policies of the party and its membership. (*Bell, et al., v. Hill, County Clerk*, 123 Tex. 531, 546; 74 S. W. (2d) 113, 120.) These rights are among those excepted from the general powers of government and reserved to the people. The right or power to determine the

qualifications for membership in a political party, like the power to determine the principles of the party, being incident to the right to organize such a party, is not a State function. If the Legislature could lawfully fix the qualifications for membership or declare the principles of such a party, it could even deny the right to organize a political party. Any attempt by the Legislature to treat any of these rights or powers as State functions and control them by legislative act would be an invasion of a right reserved to the people and withheld from the Legislature.

The resolution quoted in the majority opinion having been adopted in the exercise of the constitutional right peaceably to assemble and petition for the redress of grievances, and of rights incident to such right, and not under any statute pretending to empower political parties to determine the qualifications of its members, surely the author of the opinion and the Justices who concurred with him, will not leave standing in the opinion the thought that *United States vs. Classic* bears upon *Grove vs. Townsend*, "because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." Therein is the heart of the case, and the opinion begs the question by assuming that the power to fix the qualifications for party membership is "a State function" and that it has been delegated to political parties by legislative act.

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III.

The State Democratic Convention in Houston, Texas, on May 24, 1932, resolved that: "all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party, and as such entitled to participate in its deliberations." No amount of reasoning can avoid the conclusion that this case turns upon whether the act of adopting the resolution was State action or party action.

If the adoption of that resolution was not State action, then the provisions of the Fourteenth and Fifteenth Amendments to the Constitution of the United States have no application, for those Amendments are directed against State and not party action. One is directed against any State denying a citizen the right to vote on account of race, color or previous condition of servitude; the other is directed against any State abridging the privileges or immunities of citizens, or depriving any person of life, liberty or property without due process of law, or denying any citizen within its jurisdiction the equal protection of the law.

Petitioner must prevail, if he prevails at all, by establishing that it was the action of the State of Texas, and not the action of the Democratic party, that denied him the right to vote in a Democratic primary.

In footnote and text, the majority opinion refers to most, if not all, of the several articles of the Texas statutes relating to party primaries. The conclusion

is drawn that these statutes make the party "which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election." While there is an obsolete statute which provides that the State Executive Committee may prescribe the qualifications of membership in a political party, the resolution was not adopted under that statute. The Texas law, as construed by the Supreme Court of Texas, leaves the right to fix the qualifications for membership in a political party where the Constitution placed it,—with the people who organize such a party. (*Bell, et al., vs. Hill County Clerk*, 123 Tex. 531, 546, 74 S. W. (2d) 113, 120.) "Whatever inherent power a State political party has to determine the content of its membership resides in the State convention." (*Nixon vs. Condon*, 286 U. S. 73, 84.) Texas law recognizes this principle. (*Bell, et al., vs. Hill, County Clerk*, 123 Tex. 531, 546, 74 S. W. (2d) 113, 120.) The determination of which Petitioner complains was not made under a statute. It was made by the party convention in the exercise of rights reserved to the people by the Constitution, and not in the exercise of a power of sovereignty committed to the government and delegated by the Legislature to political parties. The challenged action was a party action taken in the exercise of a right secured by the Constitution, and not a State action prohibited by the Constitution.

The Court has taken one view of the Texas primary statutes. Even in that view, as these statutes have been construed by the Supreme Court of Texas,

there is no statute purporting to treat as a State function the power to fix qualifications for party membership and to delegate that power to party conventions; and there is no statute which delegates to political parties any part of the powers invested in the departments of government. (*Bell, et al., vs. Hill, County Clerk*, 123 Tex. 531, 546, 74 S. W. (2d) 113, 120.)

There is another view that may be taken of these statutes. The other view is that the right to organize and maintain political parties inheres in the people; that this right is subject to the power of the Legislature to enact reasonable laws intended and designed to insure fair methods and fair expressions in party affairs and reasonably related to the preservation of the peace and good order of society; and that in so far as the Texas statutes provide how a party may set up the organization for holding primaries and conventions, they were intended and designed to prevent frauds and to insure fair methods and fair expressions in party actions.

Which of these two views should be taken of these statutes? Here history lends a light. Until a comparatively recent date (about 1900, *Our Times*, Sullivan, Scribner's, vol. 2, pp. 24, 65, 528), the method of selecting party nominees was by the convention system. Many people held the view that nominating conventions were controlled by a relatively few persons and, in instances, by obnoxious political machines; that they did not result in the expression of choices of the majority of the people, but led to a minority control of public affairs; and that in in-

stances they had been controlled by self-seeking influences, if not corrupt political bosses. The remedy for the actual or supposed evils of the convention system of nominating candidates was the direct primary. It was only natural that the laws which, in effect, abolished the convention system and adopted the direct primary would descend into considerable detail to avoid what were believed to be the evils of the convention system. The statutes, in so far as they relate to the details of party organization and party primaries, obviously were designed to prevent fraud and to secure fair expression in party action. It is equally obvious that they were not designed to commit to the political parties powers of government or make them agencies of the government. If this view is taken, the primary statutes are valid; if the view adopted by the Court in the majority opinion is accepted, many of these statutes must fall as impermissible restraints on the constitutional right to organize and maintain political parties.

If the Texas primary statutes are viewed for what they really are, namely, laws designed to prevent corruption and insure orderly process and fair expression in party action, then this case can be seen for what it really involves. It was not the State of Texas that adopted the resolution at the Houston convention on May 24, 1932. It was an assembly of delegates from the two hundred fifty-four counties of Texas who had been selected at county conventions by delegates who had been selected at precinct conventions. It met with an absolute liberty to determine who was entitled to sit in the convention; with

an absolute liberty to voice its views by resolution, or otherwise, on public questions. There was no law which limited the right of the convention to determine who should compose its membership or the membership of the political party that it represented. It acted by resolution declaring who were entitled to participate in the affairs of the Democratic primary, —a voluntary organization; it chose its company.

The Chief Executive of the State of Texas was without power to prorogue that convention. The Legislature of Texas was without power to say that it could not meet or that it must adjourn. The judiciary of the State of Texas had no lawful authority to settle the list of accredited delegates to the convention or to control the declaration of party principles. It was a meeting of free men, of a common political faith, in session for the purpose of selecting delegates to the National Democratic Convention to be held in the City of Chicago, and as such it represented the Democratic party as it existed in Texas. To deny the convention the right to say who might participate in the party actions, would be as objectionable as to deny it the right to meet.

It is no argument to say that one of the Texas statutes provides that a party convention may not place in platform or resolution any demand for specific legislation without endorsement of such legislation by the voters in a primary, for that statute is so obviously in conflict with the constitutional right of petition that citation of authority is not necessary to establish its invalidity.

To denominate the convention a State agency would presuppose that it had been appointed by governmental authority to represent and exercise a portion of sovereign power. There is no statute which invested the convention with any fraction of the sovereign power of the State.

True it is that with a relatively few exceptions, but yet with some, the nominees of the Democratic primary have prevailed in elections in Texas; but the fact that the Democratic party represents the views of a majority of the people of Texas does not afford any reason why its rights and the rights of minority parties should not be measured by the same standards. People of any shade of political thought may organize political parties and function as such under the Texas primary statutes. The Legislature has no power to say, and it has not attempted to say, either directly or indirectly, who may and who may not be admitted to membership in existing political parties or in parties to be formed in the future. That is not a State power or a State function. Is the Republican Party an agency of the State to determine who may participate in the affairs of that party, or does it act in that respect as a party of people of a common political faith? It would hardly be contended by any that the Republican Party acts as an agency of the State in determining who may participate in Republican Party affairs. The fact that the Democratic Party in Texas has generally been successful in electing its nominees is not a logical basis for a conclusion that the Legislature has made that

party an agency of the State to determine who may participate in affairs of the Democratic Party.

Respectfully submitted,

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